

1 DAVID L. ANDERSON (CABN 149604)
United States Attorney

2 HALLIE HOFFMAN (CABN 210020)
3 Chief, Criminal Division

4 ANKUR SHINGAL (CABN 303434)
Assistant United States Attorney

5 450 Golden Gate Avenue, Box 36055
6 San Francisco, California 94102-3495
7 Telephone: (415) 436-7108
8 FAX: (415) 436-7234
Ankur.Shingal@usdoj.gov

9 Attorneys for United States of America

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

15 UNITED STATES OF AMERICA,)	CASE NO. CR 19-00100 VC
)	
16 Plaintiff,)	UNITED STATES' OPPOSITION TO
)	DEFENDANT'S MOTION TO SUPPRESS AND
17 v.)	REQUEST FOR EVIDENTIARY HEARING
)	
18 RAMON COFIELD,)	
)	Hearing Date: January 19, 2021
19 Defendant.)	Hearing Time: 1:30 p.m.
)	

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1 The United States hereby files its Opposition to Defendant Ramon Cofield's Motion to Suppress.
2 (Dkt. No. 55). This Opposition is based upon the files and records of the case together with the
3 following statement of facts and memorandum of points and authorities, as well as any attached exhibits.

4 INTRODUCTION

5 Defendant Ramon Cofield requests that this Court suppress the fruits of four separate search
6 warrants—to Tumblr, Google, AT&T, and for Cofield's residence—that led to evidence that he
7 possessed a significant amount of child pornography images.

8 The Court should deny his motion for numerous reasons. *First*, the Fourth Amendment is not
9 implicated in this case because Tumblr searched his account as a private entity and pursuant to its own
10 business interests, and in any event, Cofield consented to the search. Subsequent reviews of the same
11 image by the National Center for Missing and Exploited Children (NCMEC) and law enforcement—
12 specifically, San Francisco Police Department Sergeant Alicia Worthington (née Castillo)—did not
13 enlarge the scope of the search, therefore avoiding any constitutional issue. *Second*, there was ample
14 probable cause underlying each of the four warrants. Cofield presents a number of arguments that are
15 either against the weight of precedent or seek to undermine the warrants through hypertechnical parsing
16 and flyspecking of the underlying affidavits that the United States Supreme Court and the Ninth Circuit
17 have rejected. *Third*, to the extent that the Court concludes that there is a constitutional violation here,
18 the exclusionary rule is inapplicable because Sgt. Worthington acted in good faith, the inevitable
19 discovery exception applies, and the harms of suppression far outweigh the limited (if any) benefits of
20 deterrence. Cofield likewise fails to make the requisite showing for a *Franks* or evidentiary hearing.

21 As such, in light of the facts and legal precedent—including two recent cases from this District
22 in *United States v. Wolfenbarger* and *United States v. Bohannon*, which rejected the same arguments
23 that Cofield raises here—the government submits that Cofield's motion should be denied.

24 RELEVANT FACTS AND BACKGROUND

25 On February 28, 2019, Cofield was charged by Indictment with a violation of 18 U.S.C. §
26 2252(a)(4) and (b)(2) (Possession of Child Pornography). The case against Cofield began when Tumblr
27 submitted CyberTipline Report 2539044 to NCMEC. *See* Def. Ex. A.

I. Background on Various Entities Involved in this Case

A. Background on Tumblr

Tumblr is a private company that was founded in 2007. Gov’t Ex. 1 (Declaration of Marlene Bonnelly (Tumblr)) ¶ 2. Tumblr is currently owned by Automattic, Inc., and was previously owned by Yahoo! and Verizon. *Id.* Based on its company-wide held belief that “Child Sexual Abuse Material” is “abhorrent and has no place on any” of its platforms and in an effort to “combat the exploitation of children” in its and society’s interest, Tumblr has a “zero tolerance policy” regarding such material on its platforms. *Id.* ¶ 4. To detect child pornography, Tumblr uses a mix of automatic tools—including PhotoDNA, which is an automated image-detection technology used to identify illicit images—and human review through content moderation experts. *Id.* ¶ 3. PhotoDNA uses image file hash values (i.e., a unique digital signature) to automatically compare users’ uploaded content to known child pornography images. *See Microsoft PhotoDNA*, <https://www.microsoft.com/en-us/photodna>.

By using any of Tumblr’s platforms, all users agree to Tumblr’s Privacy Policy and Terms of Service. *Id.* ¶ 5 (attaching applicable Privacy Policy and Terms); *id.* at 3, 13.¹ The Privacy Policy provides that a user “consent[s] to the collection, transfer, manipulation, storage, disclosure, and other uses of your information.” *Id.* at 3. Further, under section “Information Disclosed for Our Protection and Protection of Others”, Tumblr advises all users that it reserves the “right to access, preserve, and disclose any information as we reasonably believe is necessary, in our sole discretion, to (i) satisfy any . . . legal process, governmental request, or governmental order, (ii) enforce this Privacy Policy and our Terms of Service, including investigation of potential violations” *Id.* at 9-10.

B. Background on Google

Google is a multinational corporation that boasts hundreds of internet-based products. To access the majority of Google’s products—including Google+, Google Photos, Google Drive, and Gmail—a user must create a Google account with a single username and password. *See Create a Google Account*, https://support.google.com/accounts/answer/27441?hl=en&ref_topic=3382296. Google’s products, and particularly the four outlined above, are interrelated and can often store the same data, including

¹ The government’s page citations for this declaration (Gov’t Ex. 1) refer to the page number on the top right of the document.

1 photographs. For example, Google itself has recognized that many of its users “store [their] photos on
 2 both Google Drive and Google Photos.” *See Changing how Google Drive and Google Photos work*
 3 *together*, <https://blog.google/products/photos/simplifying-google-photos-and-google-drive/>. In fact,
 4 prior to June 12, 2019— i.e., the time relevant to this case—photos that a user placed in “Google Drive
 5 storage [would] also appear in Google Photos by default.” *How to Use Google Photos to Store an*
 6 *Unlimited Amount of Photos*, [https://www.howtogeek.com/227084/how-to-use-google-photos-to-store-](https://www.howtogeek.com/227084/how-to-use-google-photos-to-store-an-unlimited-amount-of-photos/)
 7 *an-unlimited-amount-of-photos/*. Likewise, a user can send a photograph saved on Google Drive to
 8 someone else via Gmail as an attachment. *See Send Google Drive attachments in Gmail*,
 9 <https://support.google.com/mail/answer/2487407?co=GENIE.Platform%3DAndroid&hl=en>.

10 All users must agree to Google’s Terms of Service and Privacy Policy. *See* Gov’t Ex. 2
 11 (Google’s Terms, Oct. 25, 2017); Gov’t Ex. 3 (Google’s Privacy Policy, Oct. 2, 2017).² In relevant part,
 12 Google’s Terms make clear that Google “may review content to determine whether it is illegal or
 13 violates our policies, and we may remove or refuse to display content that we reasonably believe
 14 violates our policies or the law,” and that “[b]y using our Services, you agree that Google can use [the
 15 user’s personal] data in accordance with our privacy policies.” Gov’t Ex. 2 at 1-2. The Privacy Policy
 16 in turn provides that Google “will share personal information . . . if we have a good-faith belief that
 17 access, use, preservation or disclosure of the information is reasonably necessary to [(i)] meet any
 18 applicable law, regulation, legal process, or enforceable governmental request . . . [(iv)] protect against
 19 harm to the rights, property or safety of Google, our users, or the public as required or permitted by
 20 law.” Gov’t Ex. 3 at 8.

21 **C. Background on NCMEC and the CyberTipline**

22 NCMEC is a private, nonprofit corporation established to help find missing children, reduce
 23 child sexual exploitation, and prevent child victimization. *See* Gov’t. Ex. 4 (Affidavit of John Sheehan
 24 (NCMEC)), ¶ 2. NCMEC created the CyberTipline program in 1998 to organize tips and leads about
 25 child sex trafficking, molestation, and exploitation. *Id.* ¶ 3. The majority of CyberTipline reports relate
 26 to apparent child pornography and are from electronic service providers (“ESPs”). *Id.* Importantly,
 27

28 ² The government cites the Terms of Service and Privacy Policy that would have been in effect at the time of the search. To the extent that different versions apply, they are substantially the same.

1 ESPs are not required to monitor their services for apparent child pornography, though they are required
 2 by federal law to report any child pornography found on their platforms. 18 U.S.C. § 2258A. Tumblr
 3 and Google are two examples of ESPs that sometimes provide tips to NCMEC.

4 **II. Factual Background**

5 **A. Tumblr generated the subject CyberTip and submitted it to NCMEC**

6 As reflected in CyberTipline Report 25390444, generated on November 8, 2017, Tumblr
 7 submitted a CyberTip notifying NCMEC that it had located a child pornography image on a Tumblr
 8 user's account. Def. Ex. A at 3. While Tumblr first became aware of the image via a PhotoDNA
 9 search, a Tumblr employee also reviewed the image prior to its submission to NCMEC. Gov't Ex. 1, ¶
 10 7. Tumblr identified the user who uploaded the image by his username (chaz2076), email address
 11 (rxxcofield@gmail.com), and IP address (162.238.124.187). Def Ex. A at 3. The CyberTipline Report
 12 noted that the suspect's last login was on March 31, 2014, and that Tumblr had terminated the blog so
 13 that it could no longer be accessed. *Id.* The CyberTip also reflects that Tumblr had uploaded the
 14 suspected child pornography image and that "[a] representative of the company ha[d] reviewed the
 15 image[] in th[e] report." Def. Ex. A at 4.

16 NCMEC's review noted that the IP address came back to an AT&T U-verse account located in
 17 the San Francisco Metro Area. *Id.* at 9. Notably, the CyberTipline report indicates that Tumblr's
 18 providing of all information aside from the "Incident Type" and "Incident Time" was "voluntary and
 19 undertaken at the initiative of" Tumblr. *Id.*; Gov't Ex. 4, ¶ 4. NCMEC also reviewed the image and
 20 concluded that it appeared to be child pornography. Def. Ex. A at 10.

21 **B. The CyberTip was submitted to SFPD Sgt. Alicia Worthington, and she 22 subsequently obtained four state search warrants**

23 On November 30, 2017—22 days after Tumblr submitted the CyberTip—SFPD received the
 24 CyberTip from NCMEC. Declaration of SFPD Sgt. Alicia Worthington ("Worthington Decl.") ¶ 3.

25 During her investigation to determine who posted the child pornography image on Tumblr, Sgt.
 26 Worthington obtained four search warrants: (1) a December 11, 2017 warrant to Tumblr for specific
 27 information associated with email address rxxcofield@gmail.com and username chaz2076, Def. Ex. B
 28 ("Tumblr warrant"); (2) a December 11, 2017 warrant to Google for specific information associated

1 with email address rxxcofield@gmail.com, Def. Ex. C (“Google warrant”); (3) a December 21, 2017
 2 warrant to AT&T for subscriber information associated with a phone number associated with
 3 rxxcofield@gmail.com, Def. Ex. D (“AT&T warrant”); and, after the returns from the first three
 4 warrants revealed more child pornography associated with Cofield’s internet presence, (4) a May 1,
 5 2018 residential search warrant for Cofield’s residence, Def. Ex. E (“Residential warrant”).

6 **1. The Tumblr and Google warrants and returns**

7 On December 11, 2017—less than two weeks after receiving the CyberTip and 33 days after
 8 Tumblr first identified the image and submitted the Tip—Sgt. Worthington sought and obtained search
 9 warrants from Tumblr and Google for subscriber information associated with the username and email
 10 address, including associated email addresses, telephone numbers, and other contact information. The
 11 warrants also sought IP log information, such as history of user access, and relevant content from
 12 01/01/2014 to present (December 2017), including—from Tumblr—communications with individuals,
 13 images, links, and videos uploaded or saved on the account and—from Google—emails from Gmail and
 14 photos from Google Drive and Google Photos. *See* Def. Ex. B at 228; Def. Ex. C at 173.

15 Sgt. Worthington’s search warrant affidavits for both warrants included a probable cause
 16 analysis based on the CyberTip she had received from NCMEC. Def. Ex. B at 231-32; Def. Ex. C at
 17 176-77. She described briefly that Tumblr “is a microblogging and social networking website” and
 18 some details about how the site is used. *Id.* Then Sgt. Worthington described the key information
 19 learned from the CyberTip, generated on November 8, 2017:

20 Tumblr reported the following:

21 On 11/08/17 at 21:12:00 UTC a Tumblr with the user name **chaz2076** with the IP Address
 22 of **162.238.124.187** utilizing the email of rxxcofield@gmail.com uploaded the filename:
 23 **78180748604.jpg** to their Tumblr blog address of **chaz2076.tumblr.com** in early part of
 2014, beginning in February.

24 *Id.* Sgt. Worthington then explained the underlying child pornographic image she viewed, as well as the
 25 online research she conducted in late 2017, which uncovered multiple child pornography photos all
 26 associated with this same Tumblr username:

27 I reviewed the image (filename: **78180748604.jpg**) and it is described as follows:

28 The image is of a fully nude female child between the approximate ages of 9-12. The
 female child is sitting upright on her buttocks with her legs spread exposing her breasts and
 vagina to the camera while her left hand rests behind her head and her right hand is on the

1 ground supporting her seated position. The photograph appears to have been taken in an
2 undisclosed, outside wooded area.

3 I conducted an online search for **chaz2076.tumblr.com** and discovered several archived
4 images of nude underage teenage males exposing their genitals that appeared to have been
5 uploaded to Tumblr by **chaz206** to another Tumblr user's blog in 2014.

6 *Id.* After the above language, Sgt. Worthington included, in part, that “based on training and experience
7 and information supplied in the affidavit” disclosure of the requested materials “w[ould] demonstrate the
8 sexual proclivity, inclination, preference, and activities of the person under investigation, providing
9 evidence that will tend to show the person under investigation committed a felony, to wit: 311.11(a)-
10 Possession of Child Pornography.” *See* Def. Ex. B at 232; Def. Ex. C at 177.

11 Sgt. Worthington received the Google search warrant results on December 18, 2017.
12 Worthington Decl. ¶ 13. The Google returns provided further evidence of Cofield's possession of child
13 pornography, including numerous photographs of underage males and females exposing their genitalia,
14 and chats from Google Hangouts, Google's communication platform, that showed Cofield and a self-
15 identified 14-year-old individual engaging in sexually explicit conversation. *Id.*; Def. Ex. D at 111-13.
16 The returns also pointed Sgt. Worthington to identity-related information, including a phone number
17 associated with the rxxcofield@gmail.com email address (“subject phone number”), as well as profile
18 photographs that SFPD later used to positively identify Cofield by comparison to San Francisco arrest
19 records. *Id.* A subsequent records check for the subject phone number revealed that it was associated
20 with a Facebook page for Ramon Cofield. *Id.* SFPD then conducted a criminal check on Ramon
21 Cofield, and found that he is a convicted sex offender based on a prior conviction in the Northern
22 District of California for possession of child pornography. *Id.* ¶ 14.

23 More than three months after receiving Google's returns, in February 2018, Sgt. Worthington
24 received the returns from the Tumblr search warrant. *Id.* ¶ 17. The returns revealed approximately
25 1,000 images of suspected child pornography associated with Cofield's Tumblr account. *Id.*

26 **2. The AT&T warrant**

27 Upon receiving the subject phone number in the Google returns on December 18, 2017, Sgt.
28 Worthington obtained the AT&T warrant three days later, on December 21, 2017. *Id.* ¶ 15; Def. Ex. D.
The search warrant sought “[a]ll account information, email addresses, passwords, subscriber

information, and methods of payment associated with” the subject phone number. Def. Ex. D at 108. Sgt. Worthington also included in the probable cause analysis similar language from her prior affidavits for the Google and Tumblr warrants discussing the relevant information from the CyberTip, and added, among other evidence, that she received the subject phone number from Google returns and conducted an Accurant search—a LexisNexis-based public information search—to confirm that the carrier was AT&T wireless. *Id.* at 111.

The next day, on December 22, 2017, AT&T provided the subscription information including an account number, that the account holder’s name was Ramon Cofield, his address, and that his account status was active. Worthington Decl. ¶ 16; Def. Ex. E at 46. The provided address was also listed as Cofield’s address in state sex offender registry information. Worthington Decl. ¶ 16.

3. The Residential warrant

Based on the returns from the other search warrants, Sgt. Worthington obtained a warrant for Cofield’s residence on May 1, 2018. Def. Ex. E. The warrant permitted SFPD to search Cofield’s person, residence, and, among other items, “[a]ny cloud storage applications found on any media device.” *Id.* at 39. Sgt. Worthington’s search warrant affidavit set forward various evidence, including the initial CyberTip information; the steps she took to identify Cofield from his Tumblr username and Google email address; and that she then subsequently found the residence’s address in the AT&T warrant returns. *Id.* at 42, 46.

SFPD executed the search warrant on Cofield’s residence on May 3, 2018, and seized a laptop computer; six cellular phones; two DVDs; a piece of paper listing a Tumblr account, the email address rxxcofield@gmail.com, and what appeared to be passwords to those accounts; and, letters addressed to Cofield as indicia of occupancy. Worthington Decl. ¶ 19. A search of the devices has revealed hundreds of images of child pornography. *Id.*

Cofield was subsequently interviewed by law enforcement and, after receiving his *Miranda* warnings, admitted among other facts that the subject phone number and rxxcofield@gmail.com were his and that he possessed photos of underage children (between ages 13-17) from Tumblr.³ *Id.* ¶ 20.

³Although he acknowledges his incriminating statements, *see* Mot. at 1, Cofield has not raised any suppression issues with respect to those statements. To the extent that he does so on Reply, the US OPP TO DEF. COFIELD’S MOT. TO SUPPRESS
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ARGUMENT

Cofield presents a number of arguments regarding the propriety of each of the four warrants in this matter. None of his claims has merit and, to the extent that any do, none warrant suppression or a *Franks* hearing.

I. The Fourth Amendment is Not Implicated in this Case

A. There is no Fourth Amendment violation because Tumblr is a private entity that searched Cofield's account in furtherance of its independent business interests

Cofield's opening argument, Mot. at 10-13, fails because Tumblr is not a government actor. The Fourth Amendment constrains only government action and its "proscriptions on searches and seizures are inapplicable to private action." *United States v. Tosti*, 733 F.3d 816, 821 (9th Cir. 2013)); *United States v. Jacobsen*, 466 U.S. 109, 129 (1984).

Under a government-agent theory—which Cofield sets forth here, *see* Mot. at 11—the relevant inquiry to determine whether a private party has acted as a government agent is: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further [its] own ends." *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994) (citation omitted). A defendant must show that the government knew of and acquiesced to a particular search, not just a pattern of behavior. *United States v. Green*, 857 F. Supp. 2d 1015, 1018 (S.D. Cal. 2012) ("While the government generally knew that AOL, and other internet service providers, search emails for child pornography, there is no evidence (or argument) in the record to suggest that the government knew of or acquiesced in the search of Defendant's specific email account."). Moreover, the private nature of the search is "not negated by any dual motive to detect or prevent crime or assist the police." *Cleaveland*, 38 F.3d at 1094.

As Cofield himself recognizes, *see* Mot. at 13, courts have uniformly rejected the argument that electronic service providers like Tumblr act as government agents when they search user accounts.⁴ As

government reserves the right to file supplemental briefing addressing such arguments.

⁴ *See, e.g., United States v. Cameron*, 699 F.3d 621, 636–38 (1st Cir. 2012) (rejecting government actor theory for Yahoo); *United States v. Stevenson*, 727 F.3d 826, 831 (8th Cir. 2013) (AOL); *United States v. Richardson*, 607 F.3d 357, 366 (4th Cir. 2010) (AOL); *United States v. Tatomer*, 18-CR-00034 HDM, 2019 WL 1546939, at *3 (D. Nev. Apr. 9, 2019) (Skype); *United States v. Rosenow*, 17-CR-03430 WQH, ECF No. 87, at 13-14 (S.D. Cal. Nov. 20, 2018) (Yahoo); *United States v. Stratton*, 229 F.Supp.3d 1230, 1237–38 (D. Kan. 2017) (Sony PlayStation Network); *United*

Judge Koh explained last year in *United States v. Wolfenbarger*: “district courts in this district and circuit courts around the country have repeatedly rejected the contention that an ISP’s search of its own user’s account and subsequent report to NCMEC of child pornography renders the ISP a government agent.” 2019 WL 6716357, at *13 (N.D. Cal. Dec. 10, 2019). Most recently, Judge Breyer rejected this exact argument, holding that the defendant’s claim that Microsoft acted as a government agent failed because there was no “government involvement” that initiated or directed Microsoft’s search for the illicit images underlying that case. *See United States v. Bohannon*, 19-CR-00039-CRB, ECF No. 81 at 7 (N.D. Cal. Dec. 11, 2020) (attached as Gov’t Ex. 5). So too here.

Recognizing the avalanche of case law directly contrary to his position, Cofield contends that Verizon’s (previously Tumblr’s parent company) long-standing partnership with NCMEC (which Cofield claims is a law enforcement agency), *see* Mot. at 7, 13, somehow establishes that Tumblr’s search of Cofield’s files constitutes law enforcement activity. This argument fails for two reasons: (1) it overstates Tumblr’s relationship with NCMEC; and (2) even accepting *arguendo* that NCMEC is a government agency, Tumblr’s actions do not satisfy either prong of the *Cleaveland* analysis.

First, Tumblr’s relationship with NCMEC (via Verizon) in no way suggests that it was acting as a government agent. As a starting point, Cofield fails to present *any* authority that Tumblr’s (or Verizon’s) relationship with NCMEC is categorically different from NCMEC’s relationship with various other companies that likewise identify child exploitation material. *See* Mot. at 7-8. Cofield’s citations themselves identify the flaw in his argument. For example, the fact that Verizon Media is a “corporate sponsor at the ‘Protector’ level” suggests nothing when *nineteen other, private companies* qualify for that same designation, including Pokémon, Disney, and LexisNexis. *See NCMEC – Our Corporate Sponsors*, <https://www.missingkids.org/supportus/our-corporate-partners>; Mot at 7-8. Likewise, Cofield’s citation to Yahoo!’s status as a founding member of the Technology Coalition is immaterial because the Coalition is touted to be an “Industry-Wide Movement.” *See* Press Release, *Google Joins Industry-Wide Movement to Combat Child Pornography*,

States v. Lien, No. 16-CR-00393-RS-1, 2017 U.S. Dist. LEXIS 188903, at *4–5 (N.D. Cal. May 10, 2017) (Google); *United States v. Keith*, 980 F. Supp. 2d 33, 40 (D. Mass. 2013) (AOL); Green, 857 F. Supp. 2d at 1018–19 (S.D. Cal. 2012) (AOL).

1 <https://www.icmec.org/press/google-joins-industry-wide-movement-to-combat-child-pornography/>. As
 2 Judge Breyer observed in rejecting this same argument in *Bohannon*, accepting Cofield's argument
 3 would effectively mean that "anything that private persons routinely do and that helps prevent crime
 4 could constitute government action." Gov't Ex. 5 at 7.

5 Second, even if Cofield was correct in his characterization of Tumblr and NCMEC's relationship
 6 (he is not), he fails to connect that relationship to the controlling legal standard under *Cleaveland*. First,
 7 there is no evidence that the government knew about or acquiesced to Tumblr's search of Cofield's
 8 account; indeed, Sgt. Worthington's declaration that she did not know about the image until she
 9 reviewed the CyberTip and at no point directed Tumblr to look for child pornography. Worthington
 10 Decl. ¶ 4. Even accepting *arguendo* Cofield's claim that NCMEC qualifies as a government agency,
 11 NCMEC's sworn affidavit makes clear that it only learned of Tumblr's internal investigations *after*
 12 Tumblr reported its findings via the CyberTipline. See Gov't Ex. 4, ¶¶ 12, 4. This falls far short of
 13 *Cleaveland*'s first prong and is fatal to Cofield's argument. See *Bohannon*, Gov't Ex. 5, at 8 (rejecting
 14 similar claim even after assuming *arguendo* that NCMEC was a government agency because
 15 "NCMEC's participation in this series of investigations began when Microsoft sent NCMEC the
 16 CyberTip"); *Green*, 857 F.Supp.2d at 1018. Timing is vitally important here: "[O]nce a private search is
 17 completed, the subsequent involvement of government agents does not retroactively transform the
 18 original intrusion into a governmental search." *United States v. Drivdahl*, No. CR 13-18-H-DLC, 2014
 19 WL 896734, at *4 (D. Mont. Mar. 6, 2014) (quoting *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir.
 20 1976)).

21 Cofield likewise fails to meet *Cleaveland*'s second prong because Tumblr's conduct was not
 22 primarily "intended to assist law enforcement efforts." *Cleaveland*, 38 F.3d at 1093. To make the
 23 necessary showing, it would not be enough for Cofield to demonstrate that a desire to help law
 24 enforcement played a part in Tumblr's motivation, because a private party's "legitimate, independent
 25 motivation" is "not negated by any dual motive to detect or prevent crime or assist the police." *Id.* at
 26 1094; see also *Wolfenbarger*, 2019 WL 6716357, at *16. Instead, Cofield must meet a more-demanding
 27 standard: that Tumblr's independent motivations were "overridden" by a desire to assist law
 28 enforcement. *Cleaveland*, 38 F.3d at 1094. Cofield does not even attempt to meet this hurdle: he

1 presents no argument that Tumblr acted in a way divorced from its own independent motivations to
 2 assist law enforcement here. And Tumblr's declaration indicates the opposite: Tumblr polices its own
 3 platform as a matter of company policy and because it believes doing so is in its own and society's
 4 interest. Gov't Ex. 1, ¶ 4 (further stating: "This content is abhorrent and has no place on any of our
 5 platforms").

6 Cofield's reliance on *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981) is unavailing for this
 7 exact reason. See Mot. at 13. In *Walther*, the Ninth Circuit found that a private actor, an established
 8 DEA confidential informant, had acted as a government "instrument or agent" when he searched
 9 Walther's baggage because he had been paid \$800 for his previous investigative efforts. *Id.* at 790-91.
 10 The court, however, took pains to "emphasize the narrowness of [its] holding," stating "[w]e merely
 11 hold that the government cannot knowingly acquiesce in and encourage directly or indirectly a private
 12 citizen to engage in activity which it is prohibited from pursuing where that citizen *has no motivation*
 13 *other* than the expectation of reward for his or her efforts." *Id.* at 793 (emphasis added). Courts in this
 14 District have subsequently and consistently rejected attempts to extend *Walther* to voluntary searches
 15 conducted by private companies like Tumblr. See *Wolfenbarger*, 2019 WL 6716357, at *16 (finding
 16 that courts have "consistently" distinguished *Walther* on the grounds that providers "are not paid
 17 informants and are not motivated by the promise or potential of a government reward" (citation
 18 omitted)); *Lien*, 2017 U.S. Dist. LEXIS 188903 at *7-8 "*Walther* is unpersuasive" because "Google is
 19 not a paid informant," and monitors its services to ensure they do not become "a haven for abusive
 20 content"); *United States v. Viramontes*, 16-CR-508-EMC, ECF No. 33 at 6-7 (N.D. Cal. March 13,
 21 2018) (Dropbox) (attached as Gov't Ex. 6); *Bohannon*, Gov't Ex. 5, at 7 (Microsoft).⁵

22 The same reasoning applies here: Tumblr investigated the child pornography image in its own
 23 interests and consistent with its own beliefs, and was not encouraged nor rewarded by the government to
 24

25 ⁵ Furthermore, Cofield's reliance on *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016),
 26 is misplaced. *Ackerman* held merely that the government may have violated Ackerman's Fourth
 27 Amendment rights, but explicitly reserved the argument that the third-party doctrine might preclude
 28 Ackerman's Fourth Amendment claims. *Id.* at 1308. On remand, the District Court found no violation
 of Ackerman's Fourth Amendment rights. *United States v. Ackerman*, 296 F. Supp. 3d 1267, 1276 (D.
 Kan. 2017), *aff'd*, 804 F. App'x 900 (10th Cir. 2020). The Circuit Court's decision was also premised
 upon the fact that the ISP "never opened the email itself," 831 F.3d at 1306, which fundamentally
 distinguishes it from the instant case because Tumblr did view the subject image

investigate. Tumblr did not somehow morph into a government agent simply because its own reasons coincided with assisting law enforcement.

B. Even if a “search” occurred, Cofield consented through Tumblr (and Google’s) Terms of Service

Cofield’s motion also falters because he has no Fourth Amendment protected interest in the child pornography images at issue—including the image that initiated this case—given that he consented to Tumblr and Google’s search for such images. To have a valid Fourth Amendment interest in the images, Cofield must show that the government either intruded on his reasonable expectation of privacy, *Katz v. United States*, 389 U.S. 347, 353, 361 (1967) (Harlan, J., concurring), or trespassed upon his physical property, *United States v. Jones*, 565 U.S. 400, 409 (2012). This he cannot do.

It is “well settled” that one of the exceptions to both a warrant and probable cause is if the search is “conducted pursuant to consent.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). One such way to alert users that their information uploaded or stored on internet storage devices or platforms is not confidential is by requiring them to agree to the service provider’s terms of service and/or privacy policies. Lower courts have seized onto this issue, along with more general freedom of contract principles, to find that users do not have an objective expectation of privacy in the contents of their accounts if the service provider’s terms of service disclose that they are subject to monitoring for illegal content.⁶ In this District, Judge Chen likewise held that a defendant had no Fourth Amendment interest in his images of child pornography because he “consented to Dropbox’s search of his files.”

Viramontes, Gov’t Ex. 6, at 10-11. Judge Chen noted that Dropbox’s terms of service “unequivocally permit Dropbox to ‘review your conduct and content for compliance with these Terms and our Acceptable Use Policy.’” *Id.* at 11. Because these provisions “could hardly mean anything other than a warning to users that Dropbox could search their files for unlawful pornography,” Judge Chen reasoned it was objectively unreasonable for the defendant to expect privacy in those images. *Id.* at 12. Judge

⁶ See *United States v. Wilson*, No. 15-CR-02838-GPC, 2017 WL 2733879, at *7 (S.D. Cal. June 26, 2017) (finding that the defendant had no objective expectation of privacy because he agreed to Google’s terms of service, which alert users to Google’s monitoring for illegal content, when he created his account); *United States v. Ackerman*, 296 F.Supp.3d 1267, 1271-73 (D. Kan. 2017), *aff’d*, 804 F. App’x 900 (10th Cir. 2020) (same for AOL); *Stratton*, 229 F.Supp.3d at 1242 (Sony); *United States v. Morel*, No. 14-CR-148-JL, 2017 WL 1376363, at *6-7 (D.N.H. Apr. 14, 2017) (Imgur).

1 Breyer concluded the same in *Bohannon*: “Here, even if Microsoft were acting as a government agent,
 2 Bohannon consented to Microsoft’s PhotoDNA search by agreeing to Microsoft’s terms of service
 3 Thus, even were Microsoft acting as a government agent, its PhotoDNA search was reasonable under
 4 the Fourth Amendment.” Gov’t Ex. 5 at 9.

5 The same analysis is applicable here. By using Tumblr and Google’s services, Cofield agreed to
 6 each companies’ relevant terms of service and privacy policy. Those terms and policies in turn
 7 explicitly advised Cofield that each company actively monitors its platform for illicit user content and
 8 that each would disclose such content to law enforcement to comply with legal process. *See* Gov’t Ex 1
 9 at 10 (Tumblr reserving the right to “access, preserve, and disclose any information” in its “sole
 10 discretion” to comply with legal process”); Gov’t Ex. 3 at 8 (similar language for Google). Therefore,
 11 any subjective expectation that child pornography on Cofield’s Tumblr or Google platforms would not
 12 be shared with law enforcement is objectively unreasonable given Cofield’s consent to the applicable
 13 terms and privacy policies. *See Jacobsen*, 466 U.S. at 122. Stated differently, a “typical reasonable
 14 person,” *Fla. v. Jimeno*, 500 U.S. 248, 251 (1991), would have understood both companies’ terms and
 15 policies to allow each to search for and disclose content that is illegal or harmful to minors.⁷ As such,
 16 because Cofield consented to Tumblr and Google’s actions, there is no Fourth Amendment violation.

17 **C. Neither NCMEC nor Sgt. Worthington Expanded the Scope of Tumblr’s Private** 18 **Search**

19 The Court need not consider whether NCMEC or the government’s searches of the image from
 20 the CyberTip violated the Fourth Amendment because once Tumblr reviewed the image—which the
 21 CyberTip expressly states that it did, *see* Def. Ex. A at 4, 8; Gov’t Ex. 1, ¶ 7—neither NCMEC nor the
 22 government was prohibited from conducting the same search under the Fourth Amendment.⁸ As the

23
 24 ⁷ Along the same line of reasoning, Cofield’s claim is barred under the third-party doctrine.
 25 Under that doctrine, the Supreme Court has held that a “person has no legitimate expectation of privacy
 26 in information he voluntarily turns over to third parties.” *Smith v. Maryland*, 442 U.S. 735, 743–44
 27 (1979); *United States v. Miller*, 425 U.S. 435, 440–43 (1976). Here, Cofield agreed that Tumblr and
 Google could access, review, and even disclose his content. Because Cofield therefore shared his
 content with those parties, any expectation of privacy on Cofield’s part would be objectively
 unreasonable. *See Bohannon*, Gov’t Ex. 5 at 11 n.5 (holding consistently and stating “[t]he Court need
 not extend this doctrine to the full contents of a cloud storage account to conclude that it applies here”).

28 ⁸ To be clear, the government does not concede that NCMEC acted as a government agent.
 However, that argument is irrelevant for the reasons stated in this section.

Ninth Circuit explained in *Tosti*, once a private entity has frustrated an individual’s “original expectation of privacy” by conducting a search itself, “the Fourth Amendment does not prohibit governmental use of the now-nonprivate information.” 733 F.3d at 821 (the Fourth Amendment is “implicated only if the authorities use the information with respect to which the expectation of privacy has not already been frustrated” (quoting *Jacobsen*, 466 U.S. at 117)).

Here, because a Tumblr representative reviewed the image prior to submitting it to NCMEC, *see* Gov’t Ex. 1, ¶ 7, no Fourth Amendment violation occurred because the initial search and review of the image was conducted by Tumblr, a private actor, and there was no enlargement of the scope of that search by NCMEC or law enforcement agents, who merely examined the same image that had been disclosed by Tumblr.⁹ *See Bohannon*, Gov’t Ex. 5 at 11 (“[B]ecause Microsoft had the lawful and practical ability to view and disclose the image, ‘frustration’ of Bohannon’s ‘original expectation of privacy’ had already occurred.” (citing *Tosti*, 733 F.3d at 821)). And, because the image had already “indisputably” been inspected, “[the officer’s] inspection could not have caused any further intrusion.” *Id.* Consequently, because NCMEC nor the government’s search enlarged the scope of Tumblr’s search, there was no Fourth Amendment violation.

II. Each of SFPD’s Search Warrants were Valid

Cofield next claims that each of the four SFPD search warrants—the Tumblr warrant, Google warrant, AT&T warrant, and Residential warrant—violated his Fourth Amendment rights. He presents three categories of arguments: *first*, that each of the warrants relied on the unlawful initial viewing of the photograph by Tumblr, NCMEC, and SFPD discussed above; *second*, that the Tumblr and Google warrants’ affidavits included material misrepresentations and omissions; and *third*, that the Tumblr and Google probable cause statements lacked the requisite specificity. Having already established above that Tumblr, NCMEC, and Sgt. Worthington’s warrantless searches of the image did not violate Cofield’s constitutional rights, the government addresses his second and third arguments in turn below.

When considering a search warrant, the reviewing court should give great deference to a

⁹ Cofield incorrectly states that “[i]t is not clear . . . whether the specific image uploaded to the blog . . . was ever reviewed by a Tumblr employee before it was sent to NCMEC and SFPD.” Mot. at 2. As noted, both the CyberTip Report and Tumblr’s sworn declaration state otherwise.

1 magistrate's probable cause determination, and must consider whether the magistrate had a substantial
2 basis to conclude that the warrant was supported by probable cause. *See Illinois v. Gates*, 462 U.S. 213,
3 236 (1983). Where a magistrate has found probable cause, this finding should "not be reversed absent a
4 finding of clear error." *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993). The Supreme Court
5 has admonished that "courts should not invalidate warrants by interpreting affidavits in a hypertechnical,
6 rather than a common-sense, manner." *Gates*, 462 U.S. at 236. The Ninth Circuit reiterated the scope of
7 review in an en banc decision, stating that reviewing courts "are not in a position to flyspeck the
8 affidavit" and that "the magistrate judge's determination should be paid great deference." *United States*
9 *v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (quotations omitted).

10 **A. Sgt. Worthington's search warrants were based on probable cause**

11 A brief review of the progression of this investigation establishes that each of the four search
12 warrants were supported by probable cause, i.e., that there was "a fair probability that contraband or
13 evidence of a crime will be found in a particular place" to be searched. *Gates*, 462 U.S. at 238.

14 In late November 2017, Sgt. Worthington received a CyberTip from NCMEC, which provided
15 the user's email address, username, and IP address. Def. Ex. A at 3. Based on that information, Sgt.
16 Worthington determined that her "top priority" was to identify who posted the image on to the Tumblr
17 account, using the CyberTip as the starting point. Worthington Decl. ¶ 7. She conducted an online
18 search for the Tumblr username at that time, and found that there were numerous other child
19 pornography images online associated with the user's account. *Id.* ¶ 10. Because the CyberTip
20 identified a specific Tumblr username, it provided sufficient probable cause for her search warrant to
21 Tumblr to determine who the user was and to see if there were any additional child pornography images
22 present (including images that could not be found via a public search, e.g., privately-posted images).
23 Sgt. Worthington also obtained a warrant to Google based on the Tip's identification of a Gmail
24 account, and that warrant too was aimed at evidence of identity and possession of child pornography.
25 *Id.* ¶ 8. Based on her knowledge of Google's products, she purposefully limited the Google warrant to
26 those products which could store photographs or user information. *Id.* ¶ 11.

27 Sgt. Worthington received the Google returns a week later, which provided her with the subject
28 phone number, and evidence that the user possessed additional child pornography images and had

engaged in explicit conversations with a minor. *Id.* ¶ 13. After conducting further investigation, she linked the subject phone number to Cofield’s Facebook page, and then matched the photographs on his Facebook page and in his Google accounts with his prior mugshots. Only at this point was Sgt. Worthington “relatively certain” that Cofield was operating the Tumblr account and possessed child pornography. *Id.* Ten days later (December 21), Sgt. Worthington obtained a search warrant to AT&T for subscriber information based on the subject phone number to identify the subscriber. The AT&T returns came in the next day, and identified Cofield, his address, and that his account was active. *Id.* ¶ 16. Then, on February 28, 2018, the Tumblr warrant returns arrived, and Sgt. Worthington learned that there were over 1,000 images of child pornography associated with Cofield’s account. *Id.* ¶ 17. Only after receiving all of this information did Sgt. Worthington seek and obtain the Residential warrant (which Cofield does not present any substantive challenge to). *Id.* ¶ 18.

As such, Sgt. Worthington’s step-by-step investigation took her from a single child pornography image to identifying Cofield through evidence that she built through each warrant and his criminal history, and eventually to a search warrant at his residence. That is sufficient to defeat Cofield’s motion to suppress. *See, e.g., United States v. Cohen*, No. 2:17CR00114APGCWH, 2017 WL 4456043, at *4 (D. Nev. July 2, 2017), *report and recommendation adopted*, No. 2:17-CR-0114-APG-CWH, 2017 WL 4414016 (D. Nev. Oct. 3, 2017) (“Given all the circumstances set forth in the affidavit, including the cyber tip which contained an image displaying coercion by force and possible violence against a child, the follow-up investigation that connected the downloaded image to a particular computer located at Cohen's address, and Cohen's criminal history, this Court has no difficulty finding that there was a fair probability that evidence of the crime would be found at Cohen's address.”).

B. The allegedly false or omitted statements did not undercut probable cause

Cofield objects to a variety of information that he claims was either misrepresented or omitted. Specifically, he asserts that Sgt. Worthington (1) falsely stated when the image had been uploaded and that Cofield had “utilized” his Gmail address to upload it; (2) falsely stated that Cofield uploaded images to another Tumblr user’s blog; and (3) omitted a number of allegedly material facts. None of his arguments hold water.

1 **1. Sgt. Worthington did not make any false statement with regard to when the**
 2 **image was uploaded or the relevance of Cofield's Gmail account**

3 Cofield first attacks the search warrant affidavits by claiming that Sgt. Worthington falsely stated
 4 that (1) Cofield uploaded the image on November 8, 2017, and (2) that he utilized his Gmail address to
 5 do so. *See Mot.* at 16-20. His argument is premised on a single portion of the affidavits:

6 Tumblr reported the following:

7 On 11/08/17 at 21:12:00 UTC a Tumblr with the user name **chaz2076** with the IP Address
 8 of **162.238.124.187** utilizing the email of rxxcofieldgmail.com uploaded the filename:
78180748604.jpg to their Tumblr blog address of **chaz2076.tumblr.com** in early part of
 2014, beginning in February.

9 With regard to his first argument, Cofield compares the above language to the CyberTip, which
 10 states that the Tip was created on November 8, 2017. While Cofield then goes on to make bombastic
 11 arguments regarding Sgt. Worthington's veracity, Cofield's parsed reading of the affidavits ignores the
 12 fact that *all of the relevant, correct information* is in the affidavits, negating any argument that Sgt.
 13 Worthington intended to "convey [a] false impression." *Mot.* at 18. Specifically, Cofield simply
 14 ignores the affidavits' statement that the image was uploaded to the Tumblr account "in the early part of
 15 2014, beginning in February." *Def. Ex. B* at 232; *Ex. C* at 117. That statement makes clear that
 16 Cofield's uploading of the image dated back to at least 2014. Moreover, the alleged ambiguity could be
 17 resolved by adding a single colon, as done below:

18 On 11/08/17 at 21:12:00 UTC: a Tumblr with the user name **chaz2076** with the IP Address
 19 of **162.238.124.187** utilizing the email of rxxcofieldgmail.com uploaded the filename:
78180748604.jpg to their Tumblr blog address of **chaz2076.tumblr.com** in early part of
 2014, beginning in February.

20 That single punctuation mark clarifies that Tumblr reported the image on November 8, 2017, and that
 21 someone with the username chaz2076 uploaded the subject file, among others, beginning in February
 22 2014.¹⁰ Those facts are indisputably true and consistent with what Sgt. Worthington intended to convey
 23 in that paragraph. *See Worthington Decl.* ¶ 9. Cofield does not present any authority that what amounts
 24 to a grammatical error constitutes a material misrepresentation. In any event, given the "great
 25 deference" owed to Magistrates and the Supreme Court's admonishment that reviewing courts should
 26

27
 28 ¹⁰ The "early part of 2014, beginning in February" statement refers to the CyberTip's four pages
 that list "Suspect's posting IPs" that date from February to March 2014. *See Def.'s Ex. A* at USRC-4-7.

1 not employ a “hypertechnical” review of affidavits, the Court should reject Cofield’s argument. *Gates*,
2 462 U.S.at 236.

3 Cofield’s second argument—that Sgt. Worthington falsely stated that he uploaded the image
4 using his Gmail account—fails for the same reason. *See* Mot. at 16-17. Sgt. Worthington’s declaration
5 makes clear that she intended to communicate that the user had previously utilized that Gmail account in
6 association with the Tumblr blog, *not* that the user actually employed the Gmail account to upload the
7 specific file. *See* Worthington Decl. ¶ 9. A fair reading of the above language reflects that, and a
8 Magistrate Judge could reasonably infer that from the affidavit. *Gates*, 462 U.S. at 240. Even if the
9 Court were to conclude that Sgt. Worthington’s language was not perfectly precise, that does not
10 provide a basis to conclude that the Magistrate Judge clearly erred in finding that there was probable
11 cause. *Pitts*, 6 F.3d at 1369. Likewise, that Sgt. Worthington was not familiar with the inner workings
12 of Tumblr’s posting scheme does not support a finding that she recklessly or deliberately misrepresented
13 facts to the Magistrate Judge. *See United States v. Dozier*, 844 F.2d 701, 705 (9th Cir. 1988) (affirming
14 decision that officer did not act recklessly or deliberately when he misrepresented a defendant’s criminal
15 history because “he simply did not know how to read the California rap sheets”). In sum, Sgt.
16 Worthington’s affidavits provided the requisite information that the magistrates needed to believe
17 probable cause existed that more evidence would be found.

18 Cofield then asserts that these purported falsehoods are exacerbated because Sgt. Worthington
19 did not include “boilerplate” language regarding how child pornography possessors maintain possession
20 of illicit images for long periods of time, and thus presents a staleness problem. Mot. at 18, 28-29. But
21 Cofield’s staleness argument is premised on the passage of time from Cofield’s last Tumblr post in early
22 2014, while ignoring the fact that Sgt. Worthington also located numerous other images associated with
23 Cofield’s account in 2017 itself. It is axiomatic that “[t]he mere lapse of substantial amounts of time is
24 not controlling in a question of staleness.” *United States v. Lacy*, 119 F.3d 742, 745 (9th Cir. 1997)
25 (quoting *Dozier*, 844 F.2d at 707). Instead, staleness must be evaluated “in light of the particular facts
26 of the case and the nature of the criminal activity and property sought,” and information offered in a
27 search warrant will not be stale if “there is sufficient basis to believe, based on a continuing pattern or
28 other good reasons, that the items to be seized are still on the premises.” *Id.* (citations omitted).

1 Moreover, a staleness analysis should keep up with the times and technology, as Judge Posner has
2 advanced: “The most important thing to keep in mind for future cases is the need to ground inquiries
3 into ‘staleness’ and ‘collectors’ in a realistic understanding of modern computer technology and the
4 usual behavior of its users.” *United States v. Seiver*, 692 F.3d 774, 778 (7th Cir. 2012).

5 Here, the facts provided in the affidavits were sufficient for the Magistrates to conclude that the
6 probable cause was not stale. For instance, the affidavits make clear that after receiving the CyberTip—
7 and therefore within a month of seeking the search warrants—Sgt. Worthington “conducted an online
8 search for **chaz2076.tumblr.com** and discovered several archived images of nude underage teenage
9 males exposing their genitals.” Def. Ex. B at 232. This would have indicated to the Magistrate that
10 explicit images associated with Cofield’s account were still available and viewable online on Tumblr
11 near the time that the search warrant was submitted, and that the Gmail account would provide a viable
12 lead to find both additional images *and* indicia of user identity. Given that an account holder’s
13 information does not go stale in the same way that the presence of child pornography may (at least as
14 Cofield contends), the Magistrate certainly could have concluded that the search warrants provided
15 probable cause to search for the user’s identity. *See Bohannon*, Gov’t Ex. 5, at 13 (“Regardless of
16 whether people tend to keep child pornography in cloud storage accounts for long periods of time, there
17 is a commonplace probability that such accounts contain evidence probative to discovering who used the
18 account to store child pornography in the past. And a magistrate could draw that obvious inference
19 without the warrant expressly stating it.”). Moreover, the fact that Sgt. Worthington sought the search
20 warrant less than a month after viewing those images undermines any staleness concerns. Cofield
21 ignores these facts in his briefing. The affidavit also included that Sgt. Worthington had been assigned
22 the CyberTip on November 30, 2017; that Tumblr had reported that a user had uploaded child
23 pornography on to his blog; and that she had reviewed the file that was uploaded and described it as
24 explicit materials. The Ninth Circuit and courts in this District have found similar facts sufficient to
25 demonstrate probable cause. *See United States v. Nguyen*, 743 F. App’x 764, 766 (9th Cir. 2018)
26 (finding probable cause where law enforcement discovered an image on a computer and used the
27 associated IP address to find the customer’s name and address for a residential search warrant);
28 *Wolfenbarger*, 2019 WL 6716357, at *25 (finding similar facts “plainly sufficient”).

1 An additional point cuts against Cofield’s staleness argument. While the present affidavits do
 2 not include the “boilerplate” language that Cofield identifies, that within itself does not undermine the
 3 fact that there was a fair probability that evidence would be found through the search warrants because it
 4 is “not a new revelation” that possessors of child pornography “do not quickly dispose of their cache.”
 5 *United States v. Morales-Aldahondo*, 524 F.3d 115, 119 (1st Cir. 2008) (collecting cases). Judge
 6 Breyer’s recent analysis in *Bohannon* is directly on point. As here, the defendant in that case argued that
 7 the subject search warrant lacked probable cause in part because it did not “expressly state that child
 8 pornography might be stored indefinitely” in online storage. Gov’t Ex. 5, at 12. And, as here, the
 9 defendant cited the Ninth Circuit’s 1997 *Lacy* opinion, where the Court said in dictum that it was
 10 “unwilling to assume that collectors of child pornography keep their materials indefinitely.” 119 F.3d at
 11 746; Mot. at 17. Judge Breyer rejected the argument and distinguished *Lacy*:

12 *Lacy*’s dictum does not control the question whether there is a fair probability that
 13 child pornography located in a cloud storage account at one point might still be there. By
 14 now, that people who collect child pornography tend to keep their materials for long
 15 periods is arguably a matter of common sense that any magistrate could infer. Further,
 16 computing technology has changed dramatically since *Lacy* in ways that make it easier to
 17 store digital files indefinitely, the advent of cloud storage being just one example.
 Therefore, *Lacy* does not prevent the Court from holding that the past presence of child
 pornography in cloud storage creates the probability, if not certainty, that child
 pornography is currently located in the account.

18 *Bohannon*, Gov’t Ex. 5, at 14 (citation omitted). While Tumblr is not a cloud storage company—though
 19 Google provides that service—the same analysis is equally applicable to social media platforms, where
 20 uploaded photos can be stored for years, as is apparent from the facts of this case.¹¹ *Cf. Seiver*, 692 F.3d
 21 at 777 (holding that a search warrant affidavit’s failure to apprise a magistrate that deleted files on a
 22 computer are still often recoverable is not sufficient to invalidate the warrant because that fact “is or
 23 should be common knowledge”). In sum, the Court should reject Cofield’s staleness argument.

24 **2. The affidavits’ statement that Cofield uploaded images to another user’s blog does not undermine the Magistrate’s finding of probable cause**

25 Cofield next claims that Sgt. Worthington falsely stated that he uploaded sexually explicit
 26

27 ¹¹ By way of example, Facebook’s Memories notifications often bump images uploaded years
 28 and years earlier to the user. See <https://about.fb.com/news/2018/06/all-of-your-facebook-memories-are-now-in-one-place/>.

1 photographs on to another Tumblr user's blog in 2014, and therefore gave the false impression that
 2 Cofield was distributing sexual material.¹² See Mot. 20-21. Even accepting that Cofield is correct that
 3 Sgt. Worthington was mistaken in her statement, that single misstatement does not warrant suppression.
 4 Moreover, even if the Court were to excise that statement from the affidavits, they nevertheless
 5 presented sufficient probable cause.

6 As an initial matter, and as Sgt. Worthington explains in her declaration, her statement was borne
 7 of her assumption regrading Tumblr's posting scheme, Worthington Decl. ¶ 10, and that alone does not
 8 constitute the reckless or deliberate misrepresentation that Cofield must prove. See *Dozier*, 844 F.2d
 9 705 (rejecting claim that officer falsely or recklessly misrepresented defendant's criminal history when
 10 misrepresentation was because officer did not know how to read California rap sheets). Moreover, Sgt.
 11 Worthington's confusion is understandable, given that the image had "via chaz2076" written directly
 12 below it, which would indicate that chaz2076 (Cofield) had posted the image himself. Worthington
 13 Decl. ¶ 10. Notably, Sgt. Worthington did not attempt to hide her uncertainty, instead noting that the
 14 image "*appeared to have been* uploaded" to the other user's account. Def. Ex. B at 232 (emphasis
 15 added). Sgt. Worthington now understands that the other user in fact reposted the image from Cofield's
 16 Tumblr, which indicates that remnants of Cofield's blog were still repostable and viewable by the
 17 public, undermining Cofield's staleness claim and reasonable expectation of privacy in those images.

18 More importantly, even if the Court were to excise this portion of the affidavit, it does not
 19 change the probable cause analysis. A search warrant is not rendered invalid "merely because some of
 20 the evidence included in the affidavit is tainted." *United States v. Job*, 871 F.3d 852, 863–64 (9th Cir.
 21 2017) (quoting *United States v. Nora*, 765 F.3d 1049, 1058 (9th Cir. 2014)). Instead, "[t]he warrant
 22 remains valid if, after excising the tainted evidence, the affidavit's 'remaining untainted evidence would
 23 provide a neutral magistrate with probable cause to issue a warrant.'" *Id.* (citation omitted). Here,
 24 removing the fact that Cofield did not upload explicit images to another Tumblr user's webpage does

26 ¹² Cofield is referring to the following language:

27 I conducted an online search for chaz2076.tumblr.com and discovered several archived
 28 images of nude underage teenage males exposing their genitals that appeared to have been
 uploaded to Tumblr by chaz206 to another Tumblr user's blog in 2014.

not affect whether Cofield himself *possessed* child pornography. Cofield acknowledges this point by premising his entire argument on the idea that the statement provided the false impression that “Cofield ha[d] *distributed* sexual material involving minors.” Mot. at 20. He presents no argument that this statement is necessary to a probable cause determination for possession of child pornography—which is the crime that the affidavits specifically cited. *See, e.g.*, Def. Ex. B at 232 (“person under investigation has committed a felony, to wit: 311.11(a)-Possession of Child Pornography”).

Cofield’s suggestion that this statement was somehow necessary to establish probable cause to search his Gmail account similarly misses the point. The probable cause to search the Gmail account was based on its association with the Tumblr account and to assist in identifying who the user of the Tumblr account was. To correct Cofield’s own analogy, *see* Mot. at 21, the search warrant sought information from the Gmail account on the basis of contraband in a Tumblr account *because the Gmail account was used to create the Tumblr account*, indicating that a fair probability existed that user information from the Google account would assist in identifying the user of the Tumblr account. *See* Worthington Decl. ¶ 9 (“In my experience, a person’s email address could be a useful avenue in leading to the identity of the individual using the social media account.”). As such, Cofield fails to show that the Magistrate committed “clear error” in approving the search warrants. *Pitts*, 6. F.3d at 1369.

3. Sgt. Worthington did not intentionally or recklessly omit material facts, and in any event, there would be sufficient probable cause even if the affidavits were supplemented with those facts

Cofield next assails the warrants by claiming that Sgt. Worthington omitted four points: (1) that the Tumblr account had not been logged into since March 31, 2014; (2) that a representative sample of other chaz2076 blog posts were reviewed and not flagged as child pornography; (3) that the date Tumblr discovered the subject image was unknown; and (4) that Sgt. Worthington did not disclose how the image was identified (i.e., if it was reviewed by a representative or identified with hashing technology). Mot. at 22. None of these alleged omissions alter the analysis in Cofield’s favor.

As an initial matter, Cofield fails to present any evidence that Sgt. Worthington deliberately or recklessly omitted these facts. A review of his brief reveals that he offers nothing more than one conclusory statement after another simply alleging that Sgt. Worthington acted with ill intent. *See* Mot. at 22-24. That is plainly insufficient, particularly in light of Sgt. Worthington’s sworn declaration to the

1 contrary, *see* Worthington Decl. ¶ 12, and the wide berth between the alleged omissions here and the
2 kinds of omissions that have caused courts to conclude that statements were intentionally or recklessly
3 omitted in other cases. *See, e.g., United States v. Sheikh*, No. 2:18-CR-00119-WBS, 2020 WL 4923696,
4 at *2 (E.D. Cal. Aug. 21, 2020) (finding reckless omission where affidavit failed to include “information
5 about the benefits alleged victims of forced labor receive or may receive”).

6 Even if the Court were to accept that the above statements were deliberately or recklessly
7 omitted, it would then need to supplement the affidavit with the statements and consider if probable
8 cause still existed. *United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014). Here, because “probable
9 cause [would] remain[] after amendment,” there is no constitutional error. *Id.* (citation omitted). First,
10 the fact that the affidavits did not state that the Tumblr account’s last login was 2014 is rendered
11 irrelevant because Sgt. Worthington’s affidavits did reference that the subject image was uploaded in
12 “2014, beginning in February,” indicating that probable cause was based, in part, on material from 2014;
13 and that Sgt. Worthington was able to locate images associated with Cofield’s Tumblr account in 2017,
14 which undermines Cofield’s suggestion of staleness. *See* Def. Ex. B at 232. Second, Cofield’s illusory
15 linking the “representative sample” language to a claim that there was no additional child pornography
16 found on Cofield’s account is also addressed by Sgt. Worthington’s inclusion of the statement that she
17 conducted an online search in 2017 which led to the discovery of a number of additional illicit images
18 associated with Cofield’s account. *See id.* Third, the fact the affidavit did not state the date on which
19 Tumblr discovered the image is related to Cofield’s staleness argument, which does not invalidate the
20 warrants because the search warrant affidavits were *not* aimed *only* at discovering other child
21 pornography images, but also at identifying the user of the Tumblr and Google accounts. *See*
22 *Bohannon*, Gov’t Ex. 5, at 12-13 (rejecting the same argument because “[l]aw enforcement sought not
23 only evidence of child pornography, but also evidence that would help them ‘identify and arrest’ a then-
24 unknown OneDrive user who had possessed child pornography”). Fourth, whether the images were
25 identified by individual review or through a hash value, *see* Mot. 23, 28, would change nothing. Even if
26 the image had only been identified by hash value—recall that it was in fact identified by PhotoDNA and
27 then also reviewed by a Tumblr employee—the fact that the image was found in conjunction with Sgt.
28 Worthington’s 2017 search revealing images associated with Cofield’s Tumblr provided sufficient

1 probable cause.¹³

2 **C. The Tumblr and Google search warrants meet the Fourth Amendment’s specificity**
 3 **requirements**

4 Cofield next argues that the Tumblr and Google search warrants are void because they do not
 5 meet the Fourth Amendment’s specificity requirement. He is wrong again. The Ninth Circuit has
 6 separated the specificity requirement into “‘two aspects’: ‘particularity and breadth Particularity is
 7 the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement
 8 that the scope of the warrant be limited by the probable cause on which the warrant is based.’” *United*
 9 *States v. SDI Future Health, Inc.*, 568 F.3d 684, 702 (9th Cir. 2009) (quoting *In re Grand Jury*
 10 *Subpoenas*, 926 F.2d 847, 856-57 (9th Cir. 1991)). Importantly, “[w]arrants which describe generic
 11 categories of items are not necessarily invalid if a more precise description of the items subject to
 12 seizure is not possible.” *Id.* (quoting *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)).

13 Although Cofield states that the warrants are overbroad “in multiple respects,” each of his
 14 arguments returns to the same core issue: his claim that the warrants are overbroad because the “Google
 15 products are not connected to one another.” Mot. at 25; *id.* (“Here, again, the warrant conflates
 16 Google’s products.”). For support, Cofield refers back to his “Background section,” but that section
 17 itself is totally *devoid* of any citations. See Mot. at 6-7. Instead, and contrary to Cofield’s position,
 18 Google users employ the Google products in concert and often in repetitive fashion because Google is
 19 well-known to be guilty of “endless app overlap.”¹⁴ For instance, users employ Google Drive and
 20 Google Photos so interchangeably that Google sought to clarify the relationship between the products.¹⁵
 21 Cofield’s protestations to the contrary do not render the warrants overbroad.¹⁶ It also bears emphasizing

22 ¹³ Though he does not appear to raise this argument, to the extent that Cofield asserts that search
 23 via hash value is somehow insufficient, that argument has been rejected by other courts, including from
 24 this District. See, e.g., *United States v. Reddick*, 900 F.3d 636, 639 (5th Cir. 2018), *cert. denied*, 139 S.
 Ct. 1617 (2019) (collecting cases); *accord Bohannon*, Gov’t Ex. 5, at 10-11.

25 ¹⁴ *Google’s endless app overlap: What’s going on?*, <https://www.androidauthority.com/google-app-overlap-870217/>; Farhad Manjoo, *Deja Google: Why does the search company keep duplicating its own efforts*, Slate (Feb. 11, 2010), <https://slate.com/technology/2010/02/why-does-google-keep-copying-itself.html>.
 26

27 ¹⁵ *Changing how Google Drive and Google Photos work together*,
 28 <https://blog.google/products/photos/simplifying-google-photos-and-google-drive/>

¹⁶ Cofield’s belief “there is little reason to store photos in Google Drive” does not mean all users agree with his perspective, see Mot. at 25—indeed, law enforcement found child pornography images in US OPP TO DEF. COFIELD’S MOT. TO SUPPRESS

1 that Sgt. Worthington was familiar with Google and its numerous products, but nevertheless limited the
2 search warrant to the four products (Gmail, Google Photos, Google Drive, and Google+) that she
3 believed would be most likely to contain child pornography. *See* Worthington Decl. ¶ 11. Given the
4 interchangeability of the Google products, the Magistrate’s conclusion is certainly supported by
5 commonsense, which is all that is required. *See Gourde*, 440 F.3d at 1069.

6 Cofield also appears to argue that the Google warrant was overbroad as to Google Drive
7 specifically because there was no evidence that photographs were uploaded to that specific platform.
8 Mot. at 26. But no such issue exists because users can easily upload photographs to their Google Drive;
9 and in fact, during all times relevant to this case, any photograph that Cofield uploaded to his Google
10 Photos would have automatically been saved to his Google Drive. Cofield, notably, does not raise a
11 similar argument with respect to his Google Photos account. *See id.* Even assuming *arguendo* that his
12 argument is valid, there was undoubtedly probable cause to seek from Google identifying information
13 associated with the Gmail address (rxxcofield@gmail.com) that was used as the login for a Tumblr
14 account that contained child pornography. Accepting Cofield’s argument that “any imaginable content”
15 can be uploaded into a Google Drive, *id.*, a Magistrate could certainly have concluded that there was a
16 “fair probability” that evidence of attribution would have existed in the Google Drive. *Gourde*, 440
17 F.3d at 1069. Cofield’s demand for more ignores that the requisite standard is only a fair probability,
18 “not certainty or even a preponderance of the evidence.” *Id.* In any event, the inevitable discovery rule
19 applies. *See* § III(B), *infra*.

20 Cofield’s particularity claims are also flawed. Although Cofield claims the Google and Tumblr
21 warrants set no meaningful boundaries, they in fact do: they are limited by a specific date range and
22 identify the specific kinds of items to be searched. *See* Def. Ex. B at 228; Ex. C at 173. Judge Breyer
23 recently rejected a similar argument on two grounds: *first*, that a similar list of items (including “all
24 account information” and “[a]ll content in OneDrive account”) was not overly broad; and *second*, that
25 “[t]o the extent that the warrant described the account information in slightly general terms, a ‘more
26 precise description [was] not possible’” because the officer nor the magistrate “could not have known
27

28 *Cofield’s own* Google Drive.

precisely where in the OneDrive account evidence would be stored.” *Bohannon*, Gov’t Ex. 5, at 4, 16-17 (quoting *Lacy*, 119 F.3d at 746). That same analysis is equally applicable here. Further, Cofield’s argument that the Google warrant does not include a meaningful time limitation because it requests to search “contents of the Google+ Photos account including, *but not limited to*” a specific date range, Mot. at 28, both incorrectly interprets that statement and, more importantly, invites the exact kind of “hypertechnical” reading and “fly-specking” that the Supreme Court and Ninth Circuit have rejected. *See Gates*, 462 U.S. at 236; *Gourde*, 440 F.3d at 1069. Accordingly, the Court should reject Cofield’s specificity arguments.

Further, because all of Cofield’s arguments with respect to the Tumblr and Google warrants fail, his piggy-back contention that the AT&T and Residential search warrants are invalid because they rely on the Tumblr and Google search warrants should be also rejected. *See* Mot. at 29.

III. The Exclusionary Rule Does Not Apply in this Case

Even if the Court concludes that some constitutional violation occurred here—though it should not, for the reasons stated above—it should not apply the exclusionary rule for three reasons.

A. Sgt. Worthington acted in Good Faith

First, suppression is not warranted because Sgt. Worthington and SFPD relied on the validly-issued search warrants in good faith. As the Supreme Court held in *United States v. Leon*, the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. 468 U.S. 897, 922 (1984). Unless a “reasonably well trained officer would have known that the search was illegal in light of all of the circumstances,” the fruits of an illegal search should not be suppressed. *Herring v. United States*, 555 U.S. 135, 145 (2009) (citation and quotations omitted). It “is the magistrate’s responsibility to determine whether the officer’s allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate’s probable-cause determination,” *Leon*, 468 U.S. at 921, and “suppression of evidence is not an appropriate remedy where an officer executes a warrant he reasonably believed to be valid,” *United States v. Meek*, 366 F.3d 705, 714 (9th Cir. 2004).

There is no basis to suggest that Sgt. Worthington should have suspected the search warrants

1 were invalid in this case. Here, Sgt. Worthington began diligently working on the case as soon as the
2 CyberTip arrived on her desk. The CyberTip itself noted that Tumblr had found an illicit image on a
3 user's account, and that a Tumblr representative had reviewed that image. Sgt. Worthington then
4 searched on the internet to see if additional images were connected with the Tumblr username—and
5 found a trove of them still available on the internet. She then sought search warrants based on the
6 information available to her for, among other things, evidence to identify the user and to determine if he
7 possessed more child pornography. It was also reasonable for Sgt. Worthington to rely on validly-issued
8 warrants based in part on an image that been reported by Tumblr less than a month prior. While Cofield
9 quibbles with the exact wording of the warrants or claims that some may be slightly overbroad, no such
10 issues can fairly impute a lack of good faith on to Sgt. Worthington's reliance on the issued warrants.
11 Sgt. Worthington followed expected investigative steps to determine who posted child pornography on
12 the internet in this case and if there were more images associated with this individual.

13 Finally, suppression is an unfairly harsh remedy in a scenario where government agents did
14 nothing wrong. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that
15 exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid
16 by the justice system." *Herring*, 555 U.S. at 144. Sgt. Worthington's warrant applications and the
17 subsequent searches were reasonable. Even at worst, one would be hard pressed to identify exactly what
18 Sgt. Worthington did that would warrant suppression for the purposes of deterrence to protect the justice
19 system. For example, even the delay in this case cannot be attributed to Sgt. Worthington, given that
20 Tumblr only "implement[ed]" PhotoDNA in 2017, which "surfaced the reported content." Gov't Ex. 1,
21 ¶ 8. Moreover, because the alleged omissions "were readily apparent from the face of the affidavit,"
22 there can be no insinuation that Sgt. Worthington omitted this information in a deceptive manner.
23 *United States v. Thayer*, No. CR-07-812-DLJ, 2008 WL 5102529, at *6 (N.D. Cal. Dec. 2, 2008)
24 ("Notwithstanding Thayer's criticism of the agent's writing style, there was no misrepresentation of fact
25 or omission of material information in the affidavit. There was no police misconduct.").

26 **B. The Inevitable Discovery exception applies**

27 The Ninth Circuit has stated that the inevitable discovery exception "is available when the
28 government demonstrates, by a preponderance of the evidence, that it would inevitably have discovered

1 the incriminating evidence through lawful means. The government can meet its burden by
2 demonstrating that, ‘by following routine procedures, the police would inevitably have uncovered the
3 evidence.’” *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (citations omitted).

4 The inevitable discovery exception certainly applies to this case. Take, for example, Cofield’s
5 argument regarding the search of his Google Drive. *See* Argument, § II(C), *supra*. Even if the Court
6 were to conclude that the Google warrant was overbroad with respect to Google Drive, Sgt. Worthington
7 lays out the investigative steps that she would have taken if she did not obtain the Google warrant (or
8 only was able to obtain identity-related information) that would nevertheless led to sufficient probable
9 cause to obtain the Residential warrant, which in turn would have permitted her to access Cofield’s
10 Google Drive account. *See* Worthington Decl. ¶¶ 21-23. As she explains, if she was only able to obtain
11 the Google warrant for user information—which there was certainly probable cause for, as discussed
12 above, *see* Argument, § II(B)—she would have obtained the subject phone number; used the Accurint
13 search to identify AT&T as the relevant provider; sought the AT&T warrant which would have led to
14 Cofield’s name and address; and then once the Tumblr warrant indicated that over 1,000 child
15 pornography images associated with Cofield’s Tumblr existed, sought the Residential warrant as a
16 matter of routine procedure. *Id.* ¶ 21. Significantly, the Residential warrant permitted SFPD to search
17 “[a]ny cloud storage applications found on any media device.” Def. Ex. E at 39. Once SFPD had access
18 to the cell phones and computers seized from Cofield’s residence, those would have inevitably led them
19 to all of the Google products he had access to, including his Google Drive.

20 Notably, the inevitable discovery exception would apply even if the Court were to throw out the
21 *entire* Google warrant and returns. As Sgt. Worthington lays out, because the CyberTip listed AT&T as
22 the IP address’s service provider, she would have subpoenaed AT&T for identifying information.
23 Worthington Decl. ¶ 22. That, in turn, would have provided her with Cofield’s name and address, and
24 she would have proceeded down the same investigative path outlined above. *Id.* Relatedly, once she
25 learned that there were over 1,000 images on Tumblr, a subsequent search warrant to Google with the
26 benefit of that (and related) facts would have provided sufficient probable cause—the only difference
27 being a matter of a few months. *Id.* ¶ 23. As such, even if the Court finds some constitutional violation,
28 the warrants fall within the inevitable discovery exception.

C. The Exclusionary Rule is not appropriate in any event

Even if Sgt. Worthington erred in searching Cofield's accounts or residence pursuant to the four search warrants in this case, suppressing the evidence from those searches would be unjustified. Fourth Amendment violations do not automatically trigger suppression, which is not a personal right or a form of redress. *Davis v. United States*, 564 U.S. 229, 236 (2011). The "sole purpose" of the exclusionary rule is to deter future Fourth Amendment violations. *Id.* at 236–37. And the rule applies only if the benefits of deterrence outweigh suppression's social costs. *Herring*, 555 U.S. at 140–41.

The balancing test militates only against suppression here. Sgt. Worthington did not flagrantly violate the Fourth Amendment. To the contrary, she diligently worked to obtain four separate search warrants based on probable cause. Given that all of Cofield's arguments are premised on parsing the affidavits for immaterial issues or ambiguities, or on a time-delay that cannot be fairly attributed to law enforcement—Sgt. Worthington sought three of the four warrants within two months of receiving the CyberTip—any deterrence benefit from suppressing the evidence from the warrants would be minimal at best. On the other hand, suppression would impose significant costs here: letting a guilty defendant "go free." *Herring*, 555 U.S. at 141. Cofield, a felon convicted of possessing child pornography, again possessed child pornography images numbering into the thousands. The results of the warrants, and Sgt. Worthington's substantial effort in this case, provide clear evidence of his guilt. Suppression would mean he walks free without consequence. Because the social costs of suppression outweigh any deterrence benefit, the exclusionary rule should not apply here.

IV. No *Franks* or Evidentiary Hearing is required

Alternatively, Cofield claims that he is entitled to an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), based on the alleged misstatements and omissions in the search warrant affidavits. In making a *Franks* claim, Cofield has the burden of demonstrating by a preponderance of the evidence that an evidentiary hearing and suppression are warranted. *United States v. Tham*, 960 F.2d 1391, 1395 (9th Cir. 1992). A defendant seeking a *Franks* hearing must make "a substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit cannot support a finding of probable cause without the allegedly false information." *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000). This standard applies not

only to false statements made in the affidavit, but also to allegedly reckless or intentional omissions of facts. *Tham*, 960 F.2d at 1395. “In doubtful cases, preference should be given to the validity of the warrant.” *United States v. McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986).

This is no easy standard to satisfy. The “inquiry begins with a presumption that an affidavit in support of a search warrant is valid.” *Meek*, 366 F.3d at 716 (citing *Franks*, 438 U.S. at 171). Although the Fourth Amendment requires that a search warrant be supported by a “truthful” factual showing, it does not require perfection: rather, it requires “truthful” information “in the sense that the information put forth is believed or appropriately accepted by the affiant as true.” *Franks*, 438 U.S. at 165. A negligent mistake or omission, alone, does not satisfy the *Franks*’ state of mind requirement necessary to trigger an evidentiary hearing. *United States v. Garcia-Cruz*, 978 F.2d 537, 541 (9th Cir. 1992).

Cofield fails to make either showing necessary under *Franks*. With respect to the purported false statements, the three statements that Cofield points to are either a result of his own constricted reading of the affidavits or, at most, imperfect drafting. Even if the Court concluded that Sgt. Worthington was negligent—which is generous to Cofield—that would still be insufficient. See *United States v. Hodges*, 3 F. App’x 608, 610 (9th Cir. 2001) (“Officer Schmidt’s admission that his affidavit contained an incorrect statement regarding Randy’s (the narcotic detector dog) prior seizures does not meet the substantial threshold showing of an intentional false or reckless statement. Inclusion of the statement was an innocent mistake, or at most negligent, both of which are insufficient under *Franks*.”); *United States v. Staves*, 383 F.3d 977, 5 (9th Cir. 2004). The same must be said with regard to the alleged omissions. For instance, that Sgt. Worthington did not include facts about how and when Tumblr identified the image is immaterial because Tumblr is a private actor whose actions are not constrained by the Fourth Amendment—a point that Cofield all but concedes—and because those issues go *only* to Cofield’s staleness contention, which entirely ignores the probable cause to search the subject accounts for indicia of identification. Accordingly, Cofield is not entitled to a *Franks* or evidentiary hearing.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny Cofield’s motion in its entirety. Moreover, because Cofield has failed to meet the substantial showing required under *Franks*, the Court should decide the motion without an evidentiary hearing.

DATED: 12/23/2020

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

/s/ Ankur Shingal
ANKUR SHINGAL
Assistant United States Attorney